

2/6/04

Hearing:  
July 23, 2003

<p>This Opinion is Not Citable as Precedent of the</p>
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Mailed:

Paper No. 63  
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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**  
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Central Mfg. Inc.  
v.  
Astec Industries, Inc.  
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Opposition No. 91/116,821  
to application Serial No. 75/564,303  
filed on October 5, 1998  
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**On Request for Reconsideration**  
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Central Mfg. Inc., pro se.

David J. Hill and Alicia Brown Oliver of Chambliss,  
Bahner & Stophel, P.C. for Astec Industries, Inc.  
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Before Walters, Bucher and Rogers,  
Administrative Trademark Judges.

Rogers, Administrative Trademark Judge:

In an earlier opinion, this panel of the Board  
dismissed opposer's notice of opposition both on its  
merits, for opposer's failure to bear its burden of

proof, and as a sanction under Federal Rule 11. Opposer thereafter requested disqualification and removal of the author of the opinion, reassignment of the case to an entirely new panel, and reopening of the case, commencing with opposer's testimony period. The Chief Administrative Trademark Judge denied each of these requests and returned the case file to this panel for consideration of any remaining issues presented by the request for reconsideration.

In our opinion dismissing the notice of opposition, this panel decided a number of motions, either expressly made or implicit in arguments made by the parties in their final briefs. While opposer argues that almost every decision made by the panel was in error, its main complaint is that these decisions resulted from bias and prejudice. There are few arguments that the panel made errors of law. We shall, however, address whatever allegations of error we can discern in the request for reconsideration.

The panel denied a motion under Federal Rule 15(b) by opposer for leave to add a new claim to its notice of opposition. In its request for reconsideration, at page 3, opposer asserts that "a party can amend at any stage of the proceeding." We do not find this unqualified

statement to be an accurate assessment of the law and see no legal error in our denial of the motion to amend.

The panel also revisited an interlocutory ruling that a Board attorney issued after applicant filed objections to opposer's notice of reliance. The parties, in their briefs and at oral argument, clearly disagreed as to the import of the order, which we considered to be unclear. Opposer argues, at pages 5-6 and 12, that in reconsidering the matter, and finding procedural insufficiencies in opposer's notice of reliance, this panel effectively deprived opposer of an opportunity to cure the insufficiencies that it would have been afforded if applicant's motion to strike had been made earlier. We do not find any legal error in our handling of the matter, for reasons amply explained in the earlier opinion. Further, we reiterate a point made explicitly in our earlier opinion, specifically, even if we had held as untimely applicant's motion to strike most of the exhibits to the notice of reliance, applicant was free to, and did, raise well-taken *substantive* objections to the exhibits, demonstrating that the exhibits had little, if any, probative value. Thus, even if we were to reverse our decision on applicant's motion to strike, and were to consider all the exhibits attached to opposer's

notice of reliance, our decision on the merits of the opposition would not change.

Opposer also argues that the panel erred in finding that opposer could not prove ownership of its pleaded registrations by declaration alone. In support of its argument, opposer asserts there is a conflict between Board practice, as outlined in the TBMP, and a provision in the TMEP which explains that, in ex parte examination of an application, an applicant can prove ownership of prior registrations (not reflected in USPTO assignment records) by use of a declaration. We see no legal error in our adherence to standard Board practice regarding proof of ownership of pleaded registrations; nor do we see any conflict between the practice applicable in inter partes proceedings and that which is applicable in ex parte examination, which serve distinctly different purposes.

Opposer argues, for the first time in its request for reconsideration, that it was prejudiced by insufficient notice from applicant that applicant would take a testimony deposition, because opposer was thereby "forced" to participate by telephone. A request for reconsideration cannot be used to raise new arguments.

Moreover, the record revealed that opposer voluntarily chose to participate in the deposition by telephone.

The final assertion of legal error that we can find in the request for reconsideration is that the panel failed to recognize that applicant, in presenting arguments at the oral hearing that there was no likelihood of confusion between opposer's pleaded marks and applicant's mark, had implicitly admitted opposer's ownership of the registrations. We are not aware of any support for opposer's argument, and opposer does not cite to any, that an applicant that argues against an opposer's allegations of likelihood of confusion thereby admits opposer's ownership of pleaded registrations and opposer's standing, when the applicant has specifically argued that proof of standing was not established.

Accordingly, we deny opposer's request for reconsideration.